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September 8, 1993

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in MM Dockets 92-266 and 93-215

Dear Mr. Caton:

Pursuant to 47 CFR §1.1206(1) and (2), the undersigned submits this original and one copy of a letter disclosing an oral ex parte presentation.

On September 9, 1993, the undersigned met on behalf of the City of Grand Rapids and other Michigan municipalities with Mr. Robert Corn-Revere, Mr. John Hollar and Ms. Amy Koslov of the Federal Communications Commission. Each meeting dealt with the municipalities' interests in the proceedings, subscribers' need for relief from monopoly pricing, rates for cable service in municipalities, the Commission's notice of proposed rulemaking on cost of service and procedural issues under both the benchmark and cost of service approach. The attached materials were handed out at the meetings.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

John W. Pestle

JWP/kel
cc: Mr. Robert Corn-Revere
Mr. John Hollar
Ms. Amy Koslov

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	FCC 93-177
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

To the Commission:

MICHIGAN C-TEC COMMUNITIES
PETITION FOR RECONSIDERATION

Several franchising authorities in Michigan who receive cable service from C-TEC and which are informally cooperating on rate regulation ("Michigan C-TEC Communities") submit this petition for reconsideration of the Commission's May 3 Report and Order in this docket so as to allow for meaningful rate regulation under the Cable Television Consumer Protection and Competition Act of 1992 ("The Act" or "1992 Act").

Michigan C-TEC Communities respectfully suggest that the application of the 30% test for determining effective competition be clarified, especially in situations where a cable operator serves only a portion of a community and refuses to extend its lines into the balance of a community due to a claimed lack of sufficient customer density; and that the Commission clarify §76.938 of its regulations relating to proprietary information to make clear that this regulation preempts any conflicting state or local requirements.

Michigan C-TEC Communities generally support the points made by NATOA and by King County Washington, et al in their Petitions for Reconsideration in this docket even

though for reasons of brevity and economy Michigan C-TEC Communities do not comment in detail on the points made in such other petitions.

I. MICHIGAN C-TEC COMMUNITIES' REPRESENTATIVES

All communications and correspondence relating to this matter should be directed to the following representatives of Michigan C-TEC Communities; Mr. John W. Pestle, Varnum, Riddering, Schmidt & Howlett, 333 Bridge Street, N.W., P.O. Box 352, Grand Rapids, Michigan 49501-0352; Mr. Thomas O'Malley, Steering Committee Member, Michigan C-TEC Communities, City of Coopersville, 289 Danforth Street, P.O. Box 135, Coopersville, Michigan 49404-0135.

II. MICHIGAN C-TEC COMMUNITIES' INTEREST IN THIS MATTER

Michigan C-TEC Communities[1] are the franchising authorities[2] for their area and in each case are provided with cable service by C-TEC Cablevision of Michigan or its affiliates ("C-TEC"). The communities are generally small, ranging in size from 400 to 9,700 people and are mainly located in rural areas.

C-TEC, the cable operator which serves these communities is a multiple system operator which serves approximately 140,000 subscribers in Michigan on 70 different systems involving over 400 local units of government.

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[1] The Communities are Allendale Township, City of Coopersville, City of Manistee, Grand Haven Charter Township, Huron Charter Township, Leighton Township, Robinson Township, Sturgis Township, Village of Nashville, Village of Sparta, and Yankee Springs Township. Each community has retained the same counsel to assist it in regulating C-TEC's basic cable service rates and in filing complaint forms with this Commission relating to cable programming services. Mr. O'Malley is on the Steering Committee which assists the communities as they informally cooperate on these and other cable matters.

[2] For simplicity, the term "franchise" is used herein as defined in the 1984 Federal Cable Act to mean the authorization given the cable operator, whether denominated as a franchise, license, consent agreement or otherwise.

As Michigan C-TEC Communities prepare to regulate rates (or have them regulated by the FCC) they became aware of the matters set forth below in the Commission's May 3 Report and Order which should be addressed so as to provide for effective regulation.

Michigan C-TEC Communities know that the comments set forth below apply to many other communities who as yet have not had time to examine this Commission's May 3 order. For example, the comment on effective competition may apply to as many as half of Michigan's 1200 townships (which predominantly encompass less populated rural areas). The comment on proprietary information would apply to all communities in Michigan and likely many communities in other states as well.

III. MICHIGAN C-TEC COMMUNITIES' COMMENTS

A. Effective Competition--30% Test: A significant issue needing clarification by this Commission relates to the application of the 30% effective competition test in situations where the cable operator is franchised for an entire community, but refuses to serve more than a portion of it due to low customer densities in outlining areas.

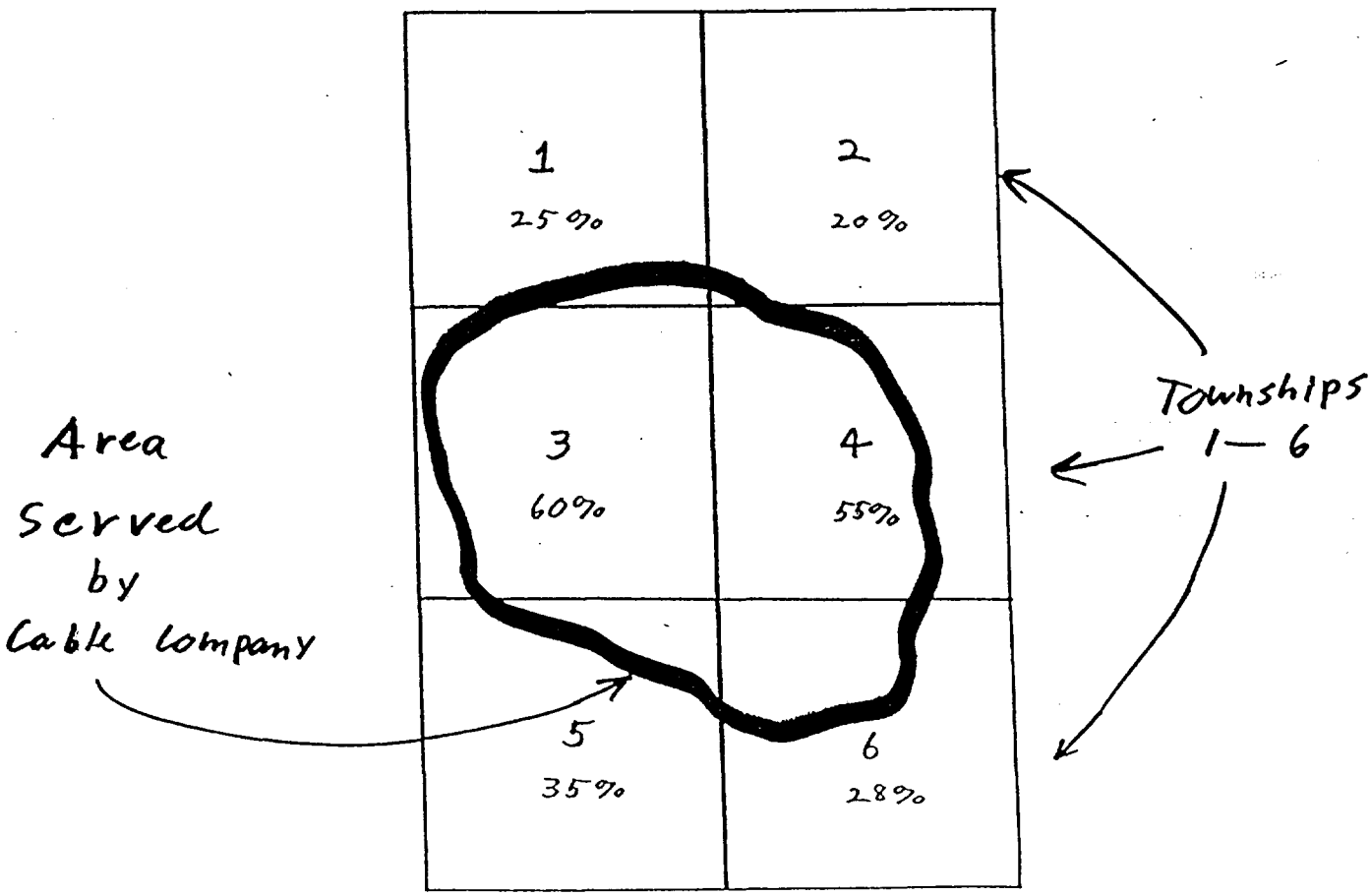
This factual situation occurs with great frequency in rural areas, where the cable operator serves a small city and the populated portions of townships adjacent to the city, but refuses to extend its lines into the rural (less populated) areas of the townships, claiming that the customer densities there are inadequate to make a profit.

Note that in most of these situations the townships are small--300 to 3,000 people and generally have no full-time municipal employees. The franchise is for the entire township, both to remove any legal barriers to the cable company extending its lines out further (the townships want to have more areas of their communities served) and because, given the small size/lack of staff at the community, the franchise was entirely drafted by the

cable company. Such franchises are rarely lengthy--usually they are one to two pages long, and can be as short as one sentence.

And although the population of the townships is small, their geographic area is large. For example, some townships in Michigan's Upper Peninsula are well over 150 square miles in area, yet have cable service only in the two to five square mile area that contains a few stores, businesses, school and some housing.

A comparable factual situation occurs on the outskirts of more populated areas, where in townships adjoining a populated area the cable operator has a franchise for the entire township, but refuses to extend its lines to the more rural areas of the township, claiming inadequate customer density.



These situations are shown diagrammatically on the preceding sketch, where the thinner lines are the boundaries between townships 1 through 6, and the heavy line is the populated area, which is the only area served by "XYZ Cable Company". The percentages are the number of households served if the percentage is computed using as the denominator the number of households in the township as a whole. Because XYZ has a penetration rate (homes served/homes passed) of 65%, the percentages are all around 65% if "households served" is computed using the number of households in the area XYZ actually serves or is ready to serve (e.g., with minimal additional investment).

Michigan C-TEC Communities respectfully request that the Commission clarify its order and § 76.905 of its rules to specify that in situations such as those just described, that the 30% effective competition test is met in all 6 townships, such that cable rates can be regulated in all 6 communities (either by the township or by the FCC). Michigan C-TEC Communities are concerned that unless such clarification occurs that:

-- At minimum there will be a lengthy stay of rate regulation in communities such as Townships 1, 2 and 6 on the such attached diagram (due to the automatic stay of rate regulation under this Commission's rules if a cable operator challenges a community's certification on effective competition grounds), or

-- At worst there will be a crazy-quilt pattern of rate regulation with cable rates regulated in communities such as Townships 3, 4 and 5 but not regulated in Townships 1, 2 and 6. Such a result would not reflect the underlying economic reality--that there is no effective competition--and makes no sense.

Specifically, the term "effective competition" in section 623 (1) (1) of the Act has to be construed in terms of its purpose, just as this Commission did in concluding (paragraph

422 of the Report and Order) that the "geographic area" over which cable rates must be uniform means the area franchised by a community (and not the several communities served by a given cable system).

The intent of Congress with the effective competition test is to determine whether there is sufficient competition in a given area such that regulation is not necessary to keep cable rates under control and remove monopoly profits. It is apparent that this intent is not met if (as cable operators' presumably will argue) the 30% test is computed using as the denominator all the households in the community, even if they are in areas where the cable operator is franchised but refuses to serve. Using such a method rates would be subject to regulation only in Townships 3, 4 and 5 but would be unregulated in Townships 1, 2 and 6. Such a result does not square with the underlying economic realities.

Michigan C-TEC Communities respectfully suggest that the Commission clarify its order and § 76.905 of its rules such that the "technically and actually available" requirements of subsection (e) (1) and (2) of § 76.905 also apply to part (b) (1) of the rule (which is the 30% test). The referenced parts of subsection (e) define a competing multichannel provider as being available only if it is available with "minimal additional investment by the distributor." Report and Order, paragraph 27.

By adopting this clarification the 30% test for effective competition will be computed using as the denominator only those homes in areas that the cable operator serves or is ready to serve with minimal additional investment and the "effective competition" test will be given a meaningful interpretation, consistent with economic realities and Congressional goals. Otherwise cable rate regulation will occur in a "crazy-quilt" pattern and many rural communities will not see the relief from excessive cable rates that Congress intended.

B. Proprietary Information: The Commission found in the Report and Order that it is essential for a franchising authority to examine actual costs in order to make an informed determination as to the reasonableness of a cable operator's rate proposal when the cable operator seeks approval of rates exceeding the Commission's presumptively reasonable level. Actual cost information will also be needed (such as on equipment costs) as part of the municipality's review of the benchmark rate calculations. Without such actual cost information, the ability of a franchising authority to regulate rates properly will be impaired. At the same time, the Commission concluded that franchising authorities must protect confidential business information from disclosure. To authorize franchising authorities to obtain actual cost information while protecting a cable operator's confidential business information, the Commission adopted § 76.398 which provides as follows:

> § 76.938 Proprietary information.
>
> A franchising authority may require the production of proprietary information to make a rate determination and in such cases must apply procedures analogous to those set forth in § 0.459 regarding requests for confidentiality.

With respect to the protection of proprietary information, footnote 349 of the Report and Order states:

> Specifically, franchising authorities will be required to adopt procedures analogous to those contained in Section 0.459 of the Commission's Rules. Under this rule, the party submitting information must request confidentiality with respect to specific portions of the material and make a showing, by a preponderance of the evidence, that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. § 552. In particular, as explained in greater detail in the cable programming services section, exemption 4 of the FOIA authorizes the Commission to withhold from public disclosure confidential commercial or financial information. If a franchising authority denies a request for confidentiality, the cable operator should be able to seek review of that decision from the Commission within 5 working days, and release of the information will be stayed pending review. See generally 47 C.F.R. § 0.459.

As noted in footnote 349, the Federal Freedom of Information Act contains an exemption for confidential commercial or financial information. Unlike the Commission, however, franchising authorities are not subject to the Federal Freedom of Information Act. Instead, they are subject to applicable state Freedom of Information Acts or similar statutes. Although many of the state statutes were patterned after the Federal Freedom of Information Act, state statutes may contain exemptions from disclosure which are different from those found in the Federal Freedom of Information Act.

For example, the Federal Freedom of Information Act exempts from disclosure:

> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.

5 USC § 552(b)(4).

The Michigan Freedom of Information Act, however, states the exemption differently as follows:

> (g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
>
> > (i) The information is submitted upon a promise of confidentiality by the public body.
> >
> > (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
> >
> > (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision shall not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

MCLA § 15.243(1)(g).

In cases where a state statute is not identical to the Federal Freedom of Information Act, cable operators can be expected to argue that a state's exemption does not protect proprietary information as required by § 76.398 and therefore the cable operator cannot be required by franchising authorities to produce any proprietary information pursuant to § 76.398.

Many state Freedom of Information Acts or similar statutes provide that if a court determines that an exemption relied upon by a municipality is not applicable, the municipality must pay the prevailing party's attorney fees.[3] Such fees can easily be in the tens of thousands of dollars. Unless the relationship between § 76.398 and state Freedom of Information Acts is clarified by the Commission, franchising authorities may be faced with risking a legal challenge under a state Freedom of Information Act (and exposing themselves to significant attorneys fees liability) by complying with § 76.398. This risk may deter some municipalities from pursuing rate regulation. Moreover, cable operators may use this issue to challenge the certification of a franchising authority that it has adopted regulations consistent with the Commission's regulations. If successful, such a challenge could require this Commission to regulate rates for basic cable service.

It is apparent from the Report and Order that the Commission does not intend to place unnecessary obstacles in the path of effective rate regulation by local franchising authorities. But this could occur if § 76.938 is not clarified because cable operators are likely to claim that essentially all data on their business operations which a franchising authority needs to do a meaningful job of rate regulation is "proprietary".

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[3]See, for example, Section 10(4) of the Michigan Freedom of Information Act (MCLA § 15.240(4)).

The simplest solution is to eliminate this potential obstacle to effective rate regulation by making clear in the Rules that to the extent state or local laws are not identical to the requirements of § 76.938 they are preempted.[4] Alternatively, the Commission could simply delete the requirement that the franchising authority must apply procedures analogous to § 0.459. This also makes sense, given that many state utility commissions are subject to the same state Freedom of Information Acts as franchising authorities, such acts are sometimes different than the Federal FOIA, and there is no good reason why claimed proprietary information of a cable operator should be treated differently than comparable information of another regulated utility.

If the Commission elects to retain § 76.938, it should expressly state that contrary state and local laws are preempted -- otherwise cable operator challenges may lead to franchising authorities either being prevented from regulating rates, unable to do an adequate job of regulation, or exposed to liability for significant attorneys fees.

Based on the foregoing, Michigan C-TEC Communities respectfully suggest that the Commission clarify that the requirements of § 76.398 preempt all state or local laws regarding the confidentiality of proprietary information required to be submitted by a cable operator to a franchising authority.

C. NATOA and Kings County Washington Petitions: Michigan C-TEC Communities generally support the positions taken in the Petitions for Reconsiderations concurrently being filed by NATOA and by Kings County Washington, et al. For reasons

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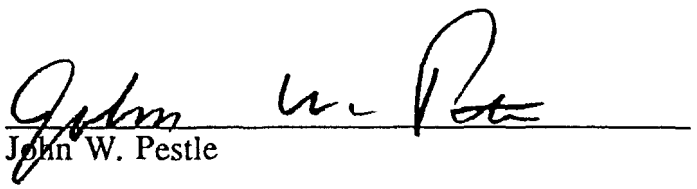
[4]By our comments, we do not concede that the Michigan Freedom of Information Act does not protect a cable operator's proprietary information from disclosure under the commercial information exemption or other exemptions under the Act. Rather, we are concerned that the differences under the Federal Act and the Michigan Act would raise the legal questions described above which can most easily be avoided by Federal preemption.

of economy and brevity, Michigan C-TEC Communities do not comment at length on these petitions.

Respectfully submitted this 18th day of June, 1993.



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Counsel for Michigan C-TEC Communities

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	FCC 93-177
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

To the Commission:

MICHIGAN COMMUNITIES' OPPOSITION AND RESPONSE TO PETITIONS FOR RECONSIDERATION AND PROOF OF SERVICE

Several franchising authorities in Michigan ("Michigan Communities") submit this opposition and response to the petitions for reconsideration filed by the National Cable Television Association, Community Antenna Television Association, Coalition of Small System Operators, Local Governments (NATOA) and King County, Washington et al. Michigan Communities address the following issues so as to have meaningful rate regulation under the Cable Television Consumer Protection and Competition Act of 1992 ("The Act" or "1992 Act"):

-- The incorrect and misleading information being provided to franchising authorities by cable operators such as Continental Cablevision require the Commission to allow municipalities/the FCC to initiate cost of service regulation or at minimum allow such regulation to be used whenever cable operators have attempted to evade the Act and its rules, such as by providing incorrect or misleading information to franchising authorities or this Commission.

-- The incorrect and misleading information being provided by operators such as Continental shows the need for the Commission to change its rules which allow cable operators to raise their rates up to the benchmark if they are currently below the benchmark to instead allow franchising authorities/FCC to reduce rates to the lower of current rates or the benchmark.

-- The need for clarification of the Commission's ruling that rate regulation agreements are invalid, such as due to statements by cable operators and others that communities can now validly enter into rate regulation agreements (but are severely hindered in settling rate cases).

-- Oppose the cable operators' attempts to turn the Commission's "price cap" regulation into "price floor" regulation by allowing (for practical purposes) all costs, including all fixed costs, to be added on to the benchmark amount.

-- Oppose different, more lenient rules for small cable systems.

-- Respond to misstatements and substantial factual errors contained in the attacks by NCTA on this Commission's use of data from municipal cable systems in setting its benchmarks, in particular its use of data from Paragould, Arkansas.

Michigan Communities bring to this Commission two perspectives that are critical for the effective implementation and enforcement of the Act. These are as follows:

-- Feedback on what cable operators are telling municipalities about this Commission's May 3 Order. Such feedback should help the Commission, in particular by showing how the cable operators are (a) utilizing ambiguities in the Commission's Order in ways that are inappropriate, and (b) in other cases providing information on the May 3 Report and Order which (at best)

is misleading and in some cases is the opposite of what this Commission has ruled.

-- Michigan Communities include many small communities with populations in the 700 to 18,000 range. By number, most of the franchising authorities in the United States are small and are in this size range. This Commission has to be sensitive, not only to small cable operators (who are complaining about the May 3 Report and Order), but to small franchising authorities and customers served by small systems. This filing assists in this regard.

I. MICHIGAN COMMUNITIES' REPRESENTATIVES

All communications and correspondence relating to this matter should be directed to the following representatives of Michigan Communities; Mr. John W. Pestle, Varnum, Riddering, Schmidt & Howlett, 333 Bridge Street, N.W., P.O. Box 352, Grand Rapids, Michigan 49501-0352; Mr. Thomas O'Malley, Steering Committee Member, Michigan C-TEC Communities, City of Coopersville, 289 Danforth Street, P.O. Box 135, Coopersville, Michigan 49404-0135.

II. MICHIGAN COMMUNITIES' INTEREST IN THIS MATTER

Michigan Communities are the franchising authorities[1] for their respective area. They are all in Michigan and include the City of Kalamazoo, City of Walker, Ada Township, Grand Rapids Charter Township and thirty-five communities who are provided with cable service by C-TEC Cablevision of Michigan or its affiliates ("C-TEC"). Such "C-TEC Communities" are generally small, ranging in size from 700 to 18,000 people and are

[1] For simplicity, the term "franchise" is used herein as defined in the 1984 Federal Cable Act to mean the authorization given the cable operator, whether denominated as a franchise, license, consent agreement or otherwise.

mainly located in rural areas.[2] C-TEC, the cable operator which serves these communities, is a multiple system operator and serves approximately 140,000 subscribers in Michigan on 70 different systems involving franchises from over 400 local units of government.

III. SPECIFIC ITEMS

A. Cost of Service/Attempted Evasions: Michigan Communities respond to the Petition for Reconsideration by King County, Washington, et al by supporting and commenting on King County's position that the FCC's rules do not go far enough and should be modified to permit franchising authorities and the FCC the discretion to initiate cost of service regulation.

Michigan Communities support this position for the reasons set forth by King County. It would allow an appropriate reduction in rates so as to benefit consumers. Michigan Communities respectfully suggest the following middle ground, namely to allow franchising authorities or this Commission on their own to initiate cost of service based regulation, but limited to those situations where cable operators have attempted to evade the rate regulation provisions of the Act or rules thereunder.

---

[2] The Communities are Allendale Township, City of Belding, City of Cadillac, City of Cedar Springs, City of Coldwater, City of Coopersville, City of Gladwin, City of Grayling, City of Ionia, City of Lake City, City of Manistee, City of McBain, City of Otsego, City of Plainwell, City of Reed City, City of Wayland, City of West Branch, Grand Haven Charter Township, Holland Township, Huron Charter Township, Leighton Township, Park Township, Pentwater Township, Richmond Township, Robinson Township, Springs Lake Township, Sturgis Township, Tallmadge Township, Village of Howard City, Village of Nashville, Village of Sparta, Village of Spring Lake, Whitewater Township, Yankee Springs Township, and Zeeland Township. Each community has retained the same counsel to assist it in regulating C-TEC's basic cable service rates and in filing complaint forms with this Commission relating to cable programming services. Mr. O'Malley is on the Steering Committee which assists the communities as they informally cooperate on these and other cable matters.

1. Continental Letter: A good example of attempted evasion are the attached letters which Continental Cablevision has sent to many of its franchising authorities in Michigan, consisting of a letter from Cole, Raywid & Braverman and a form cover letter from Continental. The text of the letter from Cole, Raywid & Braverman is as follows:

"This letter will explain the operation of the Federal Communications Commission's "certification" rules and the practical reasons why a franchising authority might wish to delay certification of basic rate regulation authority.

Although local franchising authorities may seek certification as early as June 21, 1993, there is no deadline for doing so, and no rights are forfeited through delay. When a franchising authority obtains certification (which is essentially automatic within 30 days of filing), it can always reach back to June 21 and award refunds from that date for up to one year of rate excesses (if any). Thus, a franchising authority which filed for certification in January, 1994, and received an operator's Form 393 in March, 1994, could reach back in say, April, and refund all rate overcharges from June 21, 1993, to the date of the order.

During the delay (prior to certification), a franchising authority has its maximum regulatory flexibility. It can obtain all of the FCC's benchmark data and calculate the Form 393 rate as though it were in formal proceedings. It may review informal cost of service studies. It may agree to negotiated settlements, such as using some equipment charges to subsidize lifeline or senior discounts.

However, once a franchising authority certifies, it loses that flexibility. It is bound to follow FCC rules -- all 540 pages of them -- and cannot informally "settle" a rate case. It must go through the process under FCC procedures, which requires public participation and will add to the cost of administration of the franchise. Even when it issues its final order (with which it is presumably satisfied), that order is subject to appeal to the FCC by any subscriber who participated in the rate process. And once certified, there is no provision for de-certification except one which would have the FCC take over all rate control, including control of basic. Thus, in a practical sense, certification reduces a franchising authority's options.

It is not the case that a cable operator would be free to raise rates or alter services without checking if the rate freeze expires August 3 and a city is not certified. Rate and channel changes must be preceded by 30-day notice, during which a city could certify. If the changes were at all objectionable, rates could be controlled by "reaching back" to June 21 for

refunds. As to channel changes: even if a city is certified, it is not authorized to prevent the retiering and restructuring of service tiers or to select programming which the operator must carry.

Sincerely,

Paul Glist"

The letter is seriously misleading as follows:

-- Many communities in Michigan that have received this and similar letters have rates well below the benchmark. If the communities have not taken all the steps to actually be regulating rates by November 15, Continental will be able to raise its basic cable rates and the communities will not be able to undo the increase.

-- The amount of money at stake is substantial -- for Continental systems where Michigan Communities know for sure that letters similar to the attached have been sent the amount at stake is approximately $10 per subscriber per year. Assuming (as appears likely) that this same result holds true for at least two-thirds of Continental's systems nationwide the amount at stake is $20 million per year, for years.

-- The statements in the second paragraph of the letter are simply inapplicable to the situations described above as they pertain to communities where Continental's rates are above the benchmark. Continental's letters are deceiving because they do not state that in the communities in question, rates are below the benchmark.

-- The second paragraph is misleading because it does not indicate that the NCTA (and others) are challenging the "one year reach back" provision

described in the letter. Even though some of these letters were sent out before NCTA's Petition for Reconsideration was filed, it is inconceivable that Continental (the third largest cable operator in the country) and that Cole, Raywid & Braverman (one of the leading law firms representing cable operators) were unaware of this challenge.

-- The letter is misleading because it does not point out that the one year reach back provision does not apply to rates for customer programming services.

-- The third paragraph of the letter (in combination with the fourth) says that a franchising authority can enter into enforceable agreements setting rates prior to rate regulation. This is specifically contrary to Section 623(j) of the Communications Act and Paragraphs 469-471 of the Report and Order where this Commission said that rate agreements entered into after July 1, 1990 are not enforceable.

-- Paragraph 4 of the letter improperly construes a franchising authority's ability to settle a rate case. For practical purposes, a community apparently can settle rates as long as the proposed settlement is approved in a public hearing with adequate notice and opportunity for interested parties to participate. This apparently is no different than the process followed by state regulatory commissions, this Commission or the Federal Energy Regulatory Commission.

This glaring example from Continental Cablevision shows the misstatements being employed by cable operators to evade the provisions of the Act and the May 3 Report and Order. Continental's motives for misleading franchising authorities are obvious: If it can get franchising authorities to delay so that rates are not regulated on November 15, it can raise rates for millions of subscribers nationwide -- permanently!

If the Commission does not allow communities to generally initiate cost of service regulation for cable operators, it should do so under its authority to prevent evasions of the Act. See Act, § 623(h). Such a remedy is appropriate where operators such as Continental have provided misleading or incorrect information to franchising authorities or otherwise attempted to evade the Act. Such a remedy is appropriate for such egregious behavior.

Please note that only this Commission can reign in this type of behavior by Continental and other unscrupulous cable operators: Franchising authorities served by Continental that are sophisticated enough to see through letters such as this will disregard them and act promptly so as to be regulating rates by November 15. This will prevent Continental from raising rates up to the benchmark. But unsuspecting communities which take the letters at face value will not learn the truth of the matter until it is too late. So only this Commission can act to remedy the problem and deter such actions in the future.

And this Commission cannot underestimate the magnitude of the problem: Continental is the third largest cable operator in the country. Nearly 3 million homes receive their cable service from Continental alone.

Congress and the public have been critical of this Commission for delays in implementing the Act. Regardless of the merits of such criticism, it will be compounded if late this fall operators such as Continental raise their rates throughout the country, facts such as those shown above become public, and it turns out this Commission was aware of them, but asleep at the switch. The Cable Act was intended to reduce rates. This Commission has to take action to prevent its rules being evaded to raise rates.

As an alternative to the position set forth by King County, Washington, Michigan Communities therefore respectfully suggest that this Commission modify its rules to expressly provide that a franchising authority or this Commission can on their own initiate

cost of service regulation of a cable operator if the cable operator has attempted to evade the Act or this Commission's rules, such as by misleading or deceiving the community. The definition of misleading and deception should be similar to Securities and Exchange Commission Rule 10b-5 which has become a widely accepted standard for what is misleading or deceptive:

> "It shall be unlawful for any person, directly or indirectly...to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."

17 CFR §240.10b-5

As to basic cable service, communities should be allowed in the first instance to make the preceding determinations and complete cost of service proceedings, with appeals to this Commission. Any rates so set should be retroactive as much as is necessary to undo the harm caused by the evasion so that the cable operator cannot benefit from its wrong doing. And if the franchising authority conducts such a proceeding, then, upon complaint by the municipality, this Commission should be required to set rates for customer programming services on a cost of service basis, retroactive to the same date.

The cable operators have abundantly indicated their dislike of cost of service based regulation. Such dislike indicates that it can act as an effective and legitimate deterrent to evasions of the Act and Rules.

2. N-Com Letter: A second example of misleading information is set forth in the attached letter of July 6 from N-Com Holding Corporation to the Village of Clinton, Michigan (population 2,475). N-Com is an MSO generally operating under the name of "Clear Cablevision" which serves a number of small communities in southeast Michigan.

On June 7, the Village of Clinton adopted a resolution authorizing and directing its manager and attorneys to file complaint forms with this Commission, to apply for certification and the like. The N-Com letter responds as follows:

> "I am writing in response to the cable rate resolution that the Village Council adopted on June 7, 1993. That resolution is facially inaccurate. The resolution states that Clear's cable rates "violate the FCC regulations." However, the resolution was passed weeks before rate regulation was to have gone into effect on June 21st, 1993. (The FCC has now postponed the effective date of rate regulations until October 1, 1993.) Obviously, Clear cannot be in violation of regulations that are not yet in effect. Moreover, the Village's position that Clear is in violation of FCC regulation [sic] runs directly counter to the most fundamental notions of due process since such position was taken without any hearing or request for information from Clear (as required by the new regulations) that could demonstrate (one way or another) what Clear's costs and therefore what its rates should be under the FCC's announced regulations."

This paragraph is notable for the following inaccuracies:

-- The Commission's May 3 Report and Order specifically does <u>not</u> require a franchising authority to conduct a due process hearing or request information from a cable operator prior to filing a complaint with this Commission about customer programming services. See Paragraphs 337 to 339 of the Report and Order, especially Paragraph 339 and footnote 832. There the Commission expressly said that it will apply the same minimum showing requirements to complaints filed by franchising authorities as to individual subscribers. See text of footnote 832.

-- This Commission's regulations do not require (and, cable operators will doubtless contend, do not allow) franchising authorities to generally compel production by cable operators of cost information outside of the cost of service context.

-- Finally, N-Com/Clear's position appears to run afoul of the division of jurisdiction between this Commission and franchising authorities. The kind of hearing it professes the Report and Order requires comes perilously close to requiring (if it does not achieve) rate regulation of customer programming services by a franchising authority.

Counsel for the cable company, Wilmer, Cutler & Pickering (a large Washington law firm) was copied on this letter. Whether they drafted it or only received it after the fact is unclear.

Nevertheless, small communities (such as the Village of Clinton) can easily be buffaloed by letters such as the attached, so that they never file a complaint about customer programming services or are delayed for substantial periods of time. Either result accrues directly to the financial benefit of the cable operator, given that rate regulation of such services starts only when a complaint is filed with this Commission.

Again, only this Commission can rectify this kind of evasion. Communities that are taken in by it will either not file with this Commission or will file extremely late. Communities which are aware that the letter is incorrect will go ahead and file any way and this Commission will be none the wiser.

B. Price Caps/Rates Below the Benchmark: Michigan Communities oppose the position of the National Cable Television Association that systems with rates below the benchmark may increase their rates up to the benchmark. See NCTA Petition at Summary, second page, third item (summary pages are unnumbered) and page 8 at and including footnote 14.

From preliminary analyses provided to Michigan Communities, it appears that 20% to 30% of all subscribers are served by cable systems whose rates are below the benchmark.

Note that this percentage is of subscribers -- not cable systems -- because the systems with rates below the benchmark appear to generally be the large systems in urban areas. Small rural systems who have large numbers of franchising authorities (but modest numbers of subscribers) tend to have high rates, generally above the benchmarks.

The Commission's rules provide that unless a community is regulating basic rates by November 15, for practical purposes the cable operator is able to permanently increase rates up to the benchmark level: The franchising authority is powerless to return basic rates to their preceding level. This Commission is powerless to act unless a complaint has been filed by November 15. So for communities with rates below the benchmarks, this Commission has created a 15 day window to file for certification to regulate basic rates -- if such a community files with this Commission for certification after October 15, it cannot complete the process so as to be regulating rates by November 15 and rates can permanently be raised.

This rule is a trap. It should be abolished by the Commission such that communities or this Commission may reduce rates to the lower of the benchmark amount or the amounts actually charged by the cable operator on September 30, 1992. As the letters from Continental Cablevision illustrate, cable operators are doing their best to try to make sure that communities miss the November 15 deadline. Hundreds of millions of dollars per year are at stake nationwide, permanently, given that 20% to 30% of all cable subscribers currently have rates below the benchmark.

If the cable operators felt that on September 30, 1992 that their rates were adequate, they should not be entitled to raise them due to the fortuity that they are below benchmarks subsequently set by this Commission.

Alternatively, if this Commission does not adopt the "lower of" approach at minimum, it has to greatly extend the time period in which communities with rates lower than the benchmark can file for certification -- two weeks plus a day is simply not enough, particularly given the misinformation deliberately being provided by cable operators.

C. Rate Regulation Agreements: King County, Washington and others address the issue of communities entering into rate regulation agreements with cable operators. As noted above, this Commission has ruled that such agreements are invalid. Yet at least one Commission staffer, Continental Cablevision, and others have said that communities can and should enter into such agreements. However, Robert Corn-Revere of the Commission staff has been quoted in the trade press to the contrary.

The Commission needs to resolve this dispute. Michigan Communities pose the following questions:

In many states, rate regulation is a legislative and not a judicial or contractual activity. One of the fundamental rules on the legislative powers of municipalities (and presumably of this Commission) is that one commission cannot bind future commissions. For example, one city commission cannot pass an ordinance barring future commissions from enacting ordinances, modifying ordinances, or the like.

So a rate regulation agreement in many states presumably is a legislative act that cannot validly bind future commissions. But if this Commission intends such agreements to be binding upon municipalities, it is becoming involved in a Federal/state relations area that is complicated, difficult constitutionally and very sensitive because it is attempting to confer powers on municipalities which state law often withholds.

If such rate agreements are allowed, do they cover basic cable service, cable programming services or both? Presumably they have to cover both because this